IN THE

Supreme Court of the United States

OCTOBER TERM—1949

No. 708

IB CHR SONNESEN,

Petitioner,

—v.—

PANAMA TRANSPORT COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

JACOB RASSNER,
Proctor for Petitioner.

ROBERT KLONSKY,
On Petition.

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CASES CITED

MISCELLANEOUS CITATIONS

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Opinion Below

The opinion of the Court of Appeals of the State of New York is reported at 298 N. Y. 262, 82 N. E. 2d, 569. Motion for reargument of or to amend the remittitur in the cause was denied by the said Court of Apeals on the 13th day of January, 1949, upon the ground "that the opinion of this Court shows that a Federal question was involved and was necessarily decided upon the appeal."

Jurisdiction

The judgment of the Court of Appeals was entered on the 24th day of November, 1948, and the motion for reargument was denied on the 13th day of January, 1949.

The jurisdiction of this Court is invoked under Section 2, Article III of the Constitution of the United States and 28 U. S. C. 1257 (3).

Questions Presented

The issues are resolved from a factual situation in which an alien seaman was permanently disabled by reason of a maritime tort originating in a United States port and aggravated in part on the high seas and in part at United States controlled bases and waters, while serving aboard a vessel under Panamanian registry, in fact owned by American interests, for a voyage that began and ended in United States ports, pursuant to Articles signed in a United States port, and under the control and supervision of United States authorities in aid of the United States war effort. The issues are:

1. Should an alien seaman be denied the rights and remedies of the Jones Act, Sec. 688, Title 46 U. S. C. A., for a maritime tort committed on a vessel of foreign registry,

   a) where the voyage began and ended in United States ports,

   b) pursuant to Articles signed in a United States port, and

   c) where the tort was a continuing one, originating in a United States port and aggravated in part on the high seas and in part at United States controlled bases and waters.

2. Should an alien seaman be denied the rights and remedies of the Jones Act, Sec. 688, Title 46 U. S. C. A.,

for a maritime tort committed on a vessel of foreign registry,

a) where in fact the vessel was owned by American interests,

b) where no member of the crew was a citizen of or resided in the State of registry of the vessel,

c) where the State of registry of the vessel provides no like remedy for a matter without the internal economy of the vessel.

3. Should an alien seaman be denied the rights and remedies inherent in the General Maritime Law for a maritime tort committed on a vessel of foreign registry originating in a United States port and aggravated in part on the high seas and in part at United States controlled bases and waters,

a) where the primary negligence is predicated on failure to afford a seriously ill seaman prompt and adequate treatment and relief from duties,

b) where the tort is without the internal economy of the vessel and falls within the bounds of *communis juris.*[1]

Stage in the Proceedings When Questions Arose

The issues of the above entitled action were brought on for trial before Hon. John H. McCooey, Jr., and a jury at Trial Term, Part IV, at the Supreme Court of the State of New York, held in and for the County of Kings. On the

1 United States Constitution—Section 2, Article III: "The Judicial Power shall extend to * * * all cases of admiralty and maritime Jurisdiction * * *"

30th day of September, 1946, the jury rendered a verdict in favor of the plaintiff in the sum of $15,000.00 on the first cause of action predicated on the Jones Act, and in the sum of $6000.00 for maintenance and cure on the second cause of action, making a total sum of $21,000.00.

A motion by the defendant for an order setting aside the verdict on the grounds that it was contrary to the law and against the weight of the evidence was denied by the Trial Court.

The defendant, Panama Transport Company, appealed to the Appellate Division of the Supreme Court, Second Judicial Department, on the 17th day of October, 1946. On June 30, 1947, the said Appellate Division reversed the Court below on the law and the facts, without prejudice to a later suit by the seaman to recover the expenses of such maintenance and cure as may be necessary. (The opinion of said Court appears on page 306 of the Transcript of Record.)

Thereupon, the plaintiff Ib Chr Sonnesen appealed to the Court of Appeals of the State of New York on the 25th day of August, 1947. Said Court on the 24th day of November, 1948, reversed the judgment of the Appellate Division and granted a new trial with costs to the appellant to abide the event. (The opinion of said Court appears on page 311 of the Transcript of Record.)

On the 14th day of December, 1948, the plaintiff-appellant filed a notice of motion for reargument, or in the alternative, for recall of that Court's remittitur, and amendment of the same to show that there was a Federal question involved, to wit, the interpretation of the Jones Act as to its applicability to alien seamen.

Said motion was denied on the 13th day of January, 1949, upon the ground that the opinion of that Court showed that a Federal question was involved and was necessarily decided upon the appeal.

Petitioner is foreclosed from proceeding in any State Court under and by virtue of the Jones Act.

This petition is predicated on the finality of such preclusion and in the belief that the Court below erred in holding that a Federal statute, to wit, the Jones Act, and the General Maritime Law cannot be availed of by an alien seaman for the recovery of damages predicated on a maritime tort and the expenses for maintenance and cure for an illness suffered on a voyage which began and ended in American ports pursuant to articles drawn in an American port, where the *lex loci delicti* was in part, at least, under jurisdiction of the United States Government.

The decision of the Court below was in opposition to and in disregard of the decisions of this Court and the Court of Appeals for the Second Circuit. The Federal question involved is substantial.

Statement of Facts

Petitioner joined the S.S. Orville Harden at New York (fol. 56). On October 22, 1943, he signed ship's articles on the vessel (fols. 255, 256, Def's. Exhibit C). The flag of the vessel was Panamanian.

The Crew Roll and Articles of Agreement (Def's. Exhibit C) concern a voyage from the Port of New York to "a final port of discharge in the UNITED STATES PORT ONLY." The agreement was effected at the "Office of the ..... of Panama at the Port of New York." A rider to the agreement prescribes that the entire personnel shall be subject to the decisions of the Maritime War Emergency Board as to War Risk Insurance and the Second Seamen's War Risk Policy, as amended, and war bonuses. The crew roll shows that not one member of the crew is a Panamanian or a Panamanian subject.

The Panama Transport Company, an alien corporation, maintains its principal place of business at 30 Rockefeller Plaza, Borough of Manhattan, City and State of New York (fols. 36, 37), subject to the orders and control of the Standard Oil Company of New Jersey, an American corporation (fols. 128, 802).

Respondent does not deny that all of the stock of said Panama Transport Company was owned by said Standard Oil Company of New Jersey (fol. 550).

The vessel in question was being operated on behalf of the United States Government, its navigation under control of the United States Navy (fol. 776).

At all times during the voyage, the vessel in question was under the control and domination of the United States Navy (fol. 776), compelling radio silence (fols. 778-779), directing the port to which the vessel should proceed, and re-routing the vessel at will (fols. 774, 775).

The ship sailed to Curacao, Dutch West Indies and departed from there on November 6, 1943 for the Panama Canal (fols. 769, 770). Passing through the Canal the vessel had a slight collision and it was necessary for it to return to Galveston, Texas, where it was drydocked and repaired.

On the 12th day of November, 1943, when the petitioner was sent in to steam out a tank aboard the vessel, his clothes and body became all wet (fols. 139, 144, 145). At said time he was overcome by gas fumes in the tank. About six or seven days later, he began to feel the effect of a cold (fols. 154, 155) and occasional headaches (fol. 157). The cold seemed to clear after about a week (fols. 156, 157), but about eight days later, the headaches started again accompanied by pains in the chest and a sore throat (fol. 161). The vessel left Texas City on December 22, 1943 bound for the Panama Canal on orders to sail to New Hebrides (fol. 774). During this period, petitioner

began getting headaches, pains and caught a bad cold again, of which he complained to the chief mate and requested hospitalization (fols. 161, 162). He was not relieved of his duties and continued working with complaints of headaches and pain almost every day and complete loss of appetite (fol. 163). When the vessel was two weeks west of the Canal, the United States Navy, under whose orders it was traveling, re-routed it to the island of Funafuti, one of the Ellice Islands which are in the South Pacific Ocean (fols. 774, 775, 780). Funafuti was an advance Navy Base under the jurisdiction of the United States Navy (fols. 172, 174, 349, 355, 783, 790) conceded to be an American Base by the respondent on page 6 of its brief to the Court of Appeals of the State of New York.

The mate had petitioner examined by a Navy doctor aboard a Navy ship at Funafuti. The medical log (Plaintiff's Exhibit I, fol. 474), indicates that the doctor believed that Sonnesen then had tuberculosis and the mate admitted that he heard the doctor ask Sonnesen as to any family history of tuberculosis (fol. 93).

When Sonnesen asked the mate for hospitalization (fol. 190) the mate replied that Sonnesen was healthier than the mate was and should continue with his duties (fol. 91), in spite of his complaints of headaches, chest pains, loss of appetite and continuous, steady and obvious loss of weight (fol. 191).

Sonnesen was not relieved from duty until the latter part of February, 1944 (fols. 72, 73) although the examination on the Navy ship took place on February 10, 1944 (fols. 172, 174).

On arrival at the Canal Zone from Funafuti, petitioner was transferred to the United States Marine Hospital there, where he was treated for some months and then transferred to the Brighton Marine Hospital, Brighton,

Mass., where he received treatment for almost two years (Exhibit I).

In view of petitioner's proof, the testimony of the vessel's master Kaj Borgby, constituted an admission of negligence on the part of the respondent. He testified as follows (fols. 811, 812):

> "Q. If you had seen a man losing weight from day to day regularly, so badly that you could see yourself that he was losing weight, if you saw that that particular man was suffering with a continuous cough for several weeks without let up, a bad cough, if you knew that the man had pains in his chest continuously, if you knew that the man couldn't hold his food on his stomach, would you have taken him off duty or would you have kept him on duty regardless whether he asked for it or not? A. I would have taken him off."

Dr. J. George Lang testified that Sonnesen will require seven years *outpatient car* to get the best cure possible, but that the condition was permanent and totally disabling from engaging in gainful manual occupation (fols. 491, 492).

Dr. Berthold S. Pollak corroborated this estimate of outpatient care required, his estimate being from five to eight years for further outpatient treatment to obtain the best cure possible, but that he would never be entirely cured (fol. 424). He fixed the minimum period of outpatient care required at five years (fol. 424).

The tort was a continuing one, committed mainly within the ports, bases, territorial waters and waters under the jurisdiction of the United States, to wit, New York City (fol. 56), Galveston and Texas City (fols. 57, 153, 773), Balboa, Canal Zone (fols. 63, 138, 773), Guantamano, American Navy Base in Cuba (fol. 773), Advanced American Navy Base at Funafuti (fols. 349, 355, 783, 790).

Specification of Errors to Be Urged

The Court of Appeals of the State of New York erred:

1. In holding that the verdict for petitioner on the first cause of action could not stand by reason of his action under and by virtue of the Jones Act.

2. In failing to hold in consonance with the opinions of the Federal Courts that an alien seaman serving aboard a vessel under foreign registry for a voyage which began and was to end in American ports pursuant to ship's articles signed here in an American port could proceed under the Jones Act.

3. In failing to hold that the *lex loci delicti* herein was under American jurisdiction.

4. In failing to hold that by reason of the control of the vessel by the United States authorities that alien seamen serving thereon should be afforded the benefits of the Jones Act.

5. In failing to hold that the vessel under foreign registry, in fact owned by an American corporation, comes within the purview of American statutory law.

6. In failing to hold that matters not within the internal economy of the vessel, nor involving discipline, as in this case, where negligence of the respondent is involved, should be determined according to the Jones Act and/or General Maritime Law.

7. In remitting this cause to Panamanian law wherein there is no like remedy as the Jones Act.

8. In failing to reverse the Appellate Division in its holding that a seaman could not recover for maintenance and cure despite convincing, substantial and reliable evi-

dence, and belief by the jury to the effect that petitioner would be required to spend from five to eight years as an outpatient before he could attain the best cure possible.

9. In failing to hold that *Kyriakos* v. *Goulandris, et al.*, 151 F. (2d) 132, *Gambera* v. *Bergoty*, 132 F. (2d) 414 c.d. 319 U. S. 742 and *McGhee* v. *U. S. A.*, 154 F. (2d) 101, were determinative holdings on the questions presented herein.

10. In failing to apply the Jones Act, although the vessel was of foreign registry, by reason of *de facto* ownership by an American corporation, in opposition to the cases of *Gerradin* v. *United Fruit Co.*, 60 F. (2d) 927 c.d. 287 U. S. 642 and *Carroll* v. *U. S., et al.*, 133 F. (2d) 690.

11. In failing to reinstate the judgment, based on a jury verdict, which the trial court ruled was in accordance with the Law and supported by the evidence.

Reasons for Granting the Writ

An alien seaman serving in aid of the United States war effort has been discriminated against by the Court of Appeals of the State of New York and denied the protection of the Jones Act accorded American seamen under similar circumstances.

This case concerns a continuing tort committed by the respondent against the petitioner, originating at Galveston and occurring in part on the high seas and in part on waters, bases, and territories under the jurisdiction of the United States Government.

There is a recent and clear line of decisions emanating from the Court of Appeals for the Second Circuit to the effect that the controlling element is whether a voyage commenced and was terminated in United States ports.

In the case of *Gambera* v. *Bergoty, supra,* said Circuit Court found for an alien seaman as to the applicability of the Jones Act by reason of the fact that the voyage began and ended in the United States.

Judge Augustus N. Hand, in the case of *Kyriakos* v. *Goulandris, et al., supra,* presented the issue in the following language (p. 136):

> "We are thus called upon to determine whether an alien seaman who signed on in an American port for a voyage beginning and ending in American waters can sue under the Jones Act. Although the matter is doubtful we believe that he can."

In that case Judge Hand distinguished the case of *The Paula,* 91 F. (2d) 1001, where a German seaman signed on in Chile for a voyage aboard a Danish vessel and by analogy cited this Court's decision in the case of *Patterson* v. *Bark Endora,* 190 U. S. 172, wherein it was held on page 179:

> "We are of the opinion that it is within the power of Congress to protect all sailors shipping in our ports on vessels engaged in foreign or interstate commerce, whether they belong to citizens of this country or of a foreign nation, and that our courts are bound to enforce those provisions in respect to foreign equally with domestic vessels."

Referring to said opinion of this Court, Judge Hand continued as follows on page 137 of the *Kyriakos* opinion:

> "By it, the class protected by Congress is defined as 'all sailors shipping in our ports'. No distinction is made between foreign and American sailors, or foreign and American ships."

The Court, in *Kyriakos* v. *Goulandris, et al., supra,* concluded that by reason of the statute and decisions, particularly *Gambera* v. *Bergoty, supra,* that this all would:

> "* * * indicate a tendency to give the statutes in aid of seamen a liberal interpretation which would seem to cover the rights of the libellant in the present case. It would not invade the internal economy of foreign vessels further than has already been done and would pro tanto lessen a competitive advantage to foreign shipowners in hiring aliens rather than Americans for their crews."

The dissenting opinion of L. Hand, *C. J.*, analyzed the meaning of the *Kyriakos* decision to the effect that liability would hereafter depend on whether "the foreign seaman signs on in a United States port or abroad" (p. 139).

This trend to give the Jones Act a liberal interpretation is grounded in *Uravic* v. *Jarka,* 282 U. S. at page 240, 51 S. Ct. 111, 112, 75 L. Ed. 312, where this Court stated with reference to an American stevedore injured while at work in New York Harbor on a German owned ship, opinion by Judge Holmes, as follows:

> "* * * we see no reason for limiting the liability for torts committed there when they go beyond the scope of discipline and private matters that do not interest the territorial power."

The inclination of our Courts to assume jurisdiction of meritorious foreign seamen cases, even where an internal matter as wages is concerned, can be found in cases decided as far back as the 18th and 19th centuries:

> *Weiberg, et al.* v. *The St Oloff,* 2 Pet. Adm. 428, 29 Fed. Cases 591, Case No. 17,357; 1790;

Bucker v. *Klorkgetter*, 4 Fed. Cases 555, Case No. 2083; 1849; and cases cited therein;

The Lillian M. Vigus, 15 Fed. Cases 520, Case No. 8346; 1879 (note that this case turned on the fact that the foreign seamen were from a different country than the State of registry of the vessel, as in the case at bar).

The petitioner contends that he is entitled to the same rights as an American seaman.

Any doubt on this score must be resolved in the petitioner's favor, as stated by Frank *C. J.* Court of Appeals for the Second Circuit, March 5, 1946, in the case of *McGhee* v. *U. S. A., supra*:

> "Congress plainly meant to grant those alien seamen who manned our merchant marine during the war in the time of our dire necessity the same protection as American seamen. Surely nothing less could in decency have been vouchsafed them. * * * We cannot believe that it was the intent of Congress by such juggling to keep the promise to the ear, only to break it to the hope."

The United States Supreme Court has held time and again that an action predicated on tort may be maintained in any jurisdiction whose policy is not contrary to the laws where the tort was committed.

Huntington v. *Attrill*, 146 U. S. 657;
Stewart v. *B. & O.*, 168 U. S. 445.

The opinion of the Court of Appeals of the State of New York refers to an Article by Carlos Berguido, Jr., on the Rights of a Seaman on a Ship under Panamanian Registry, 19 Temple L. Q. 458.

In said article there is no reference whatsoever to an action predicated on tort and the recovery of damages therefor. According to the writer of said article, by *Article 1217 of the Commercial Code of the Republic of Panama*, recovery is allowed to a member of a crew who is ill, wounded or mutilated, to the extent of his wages until recovery and a reasonable sum for repatriation expenses, but is completely silent as to damages for personal injury or illness aggravated by negligence.

After analyzing the Article, one must infer that Panamanian law is silent and would not control where tort is committed on the high seas. Your petitioner has been unable to find any law of Panama that would allow an action for negligence by a seaman against a shipowner.

Then one must look to the law of the state in control of a vessel and not of the law where said vessel may be registered.

The conclusion that the United States Government by its control of the navigation of the vessel must allow its statutory benefits to be availed of in favor of alien seamen inheres in the following statement by the late Chief Justice Stone in the case of *O'Donnell* v. *Great Lakes Co.*, 318 U. S. 36, where on page 42, he states as follows:

> "The right of recovery in the Jones Act is given to seamen as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters."

Further, the record discloses that the respondent has failed to sustain its burden of showing that it falls within the provisions of Article 1080 of the *Commercial Code*

of the Republic of Panama, as set forth in the *Temple L. Q. Article, supra,* as follows:

> "Article 1080: Merchant ships belonging in whole or in part to Panamanian citizens or to foreigners domiciled in the Republic and with more than five years' residence therein, or to commercial companies having their principal office and place of business in Panama, shall be considered as Panamanian, provided they be registered and enrolled as such and their owners submit expressly to the legal provisions of the Republic concerning navigation * * *."

Respondent could not sustain such burden because in fact the principal office of the Panama Transport Company is in New York City (fols. 36, 37). It was not denied that the entire stock of the Panama Transport Company was owned by an American corporation (fol. 550).

Mr. Berguido sets forth a usual agreement by and between a Panamanian corporation and its crew members on a Panamanian registered vessel where the intent of the parties is to be bound by Panamanian law in respect to injuries and illness suffered on such vessel. No such agreement is involved herein. The omission is compelling, particularly in the light of the rider to the Articles of Agreement pertaining to insurance coverage and war bonuses under the administrative direction of the United States Shipping Commissioner. The only office of the Panama Transport Company referred to in said agreement is the office at the Port of New York. These facts, together with the other facts of relationship recited above, conclusively show indicia of ownership and/or control by an American corporation, and domination by the United States of America.

On this set of facts, the case of *Gerradin* v. *United Fruit Co., supra,* is in point. There the S.S. Castilla was an American owned vessel but registered under the law of Honduras and flying the Honduras flag. In an opinion by Augustus N. Hand, *C. J.*, concurred in by L. Hand and Swan, Circuit Judges, the Court of Appeals for the Second Circuit held that it was primarily concerned with the fact that the vessel was in fact owned by an American corporation.

Referring to *Article 22 of The Treaty of Honduras with the United States,* which states that the Consular Officer would have exclusive jurisdiction arising out of the internal order of private vessels of his country, the Court held as follows on page 930:

> "This article relates only to matters of 'internal order' or 'discipline' on board a vessel of Honduran registry as to which the treaty might prevail in an American port, but it does not affect rights of seamen to recover damages for negligence against an American citizen who owns the vessel."

This was followed in *Carroll* v. *United States, et al.,* 133 F. (2) 690, opinion by Learned Hand, Circuit Judge, where an alien seaman was allowed to sue under the Jones Act for personal injuries suffered on a vessel under Panamanian registry, in fact owned by American interests, *as in the case at bar,* the Court stating as follows on page 693:

> "Hence the libellant was free to sue the Agency in the Southern District of New York under the Jones Act if it had its principal office in that district. Sec. 688, Title 46, U. S. C. A. It is true that the record shows only that it had 'an office' within the district, but the

chance is so small that the principal office of a New York corporation engaged in the steamship business should be in another district of the state, that we may assume the contrary until an objection be raised. Moreover, since the ship was American owned—even though under foreign registry—the libellant, an alien, may avail himself of the Jones Act. Gerradin v. United Fruit Co., 2 Cir., 60 F. 2d 927."

It is significant in the case at bar that the answer of the Panama Transport Company does not challenge venue or the jurisdiction of the forum.

There is absolutely no justification for the laws of Panama to govern the rights of an alien seaman disabled during his service in aid of the U. S. war effort which Panamanian laws give practically no protection to a seaman and no cause of action for damages caused by the fault of a ship's officer or fellow crew member.

As heretofore pointed out, it would be clearly against public policy and in violation of the intent of the Jones Act to deprive American seamen of equal opportunity with alien seamen to get employment in American ports on ships flying alien flags, where the true ownership as distinguished from the record ownership of the vessel, is actually American. It is likewise contrary to the intent of the Jones Act to make a distinction as to the applicability of the provisions of the Jones Act to an American seaman and to an alien seaman.

Irrespective of the question of ownership and the fact that the *lex loci delicti,* in part at least, was under the jurisdiction of the United States Navy, respondent should be held amenable to the provisions of the Jones Act.

1. It would be against public policy and unjust to permit American steamship companies to put their vessels

under alien flags for the primary purpose of evading and avoiding the laws of the United States.[2]

2. It would be against public policy and unjust to permit American steamship companies to make contracts in the United States for voyages which are to commence and terminate in the United States, to be controlled by the laws of a foreign country which renders no protection or redress to seamen injured or rendered ill in the service of their vessels.

3. It would be against public policy and unjust to permit American steamship companies by legal jugglery to avoid the laws of the United States by placing ships which they manage, control and operate under a foreign flag by having the title to the ownership of the ship in the name of an alien company, the stock of which is entirely owned by said American companies.[3]

4. It would be against public policy, unfair and unjust to sanction any law which would deprive an American seaman of the same opportunity to get employment as an alien seaman, by reason of the fact that American seamen are entitled to the benefits of the Jones Act and

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2 See N. Y. Times, March 29, 1949, p. 51, article headed "Flag-Switch Ships Facing A Boycott" as to the resolution of the International Transport Workers Federation against shipowners in the United States and elsewhere who transfer registry of ships to Panama and Honduras "to beat paying union wages * * * and to beat living up to safety rules and regulations".

3 See New York Herald Tribune, February 27, 1947, p. 36, article headed "Ships, Transfer to Panamanian Flag Is Upheld", wherein Joel Medina, Chief of the Shipping Section of the Panamanian Ministry of Finance, was quoted as stating that the capital interest of the greater portion of the Panamanian merchant marine was in the United States and that less than 10% of the crews of these vessels are Panamanian.

alien seamen hired in the United States, as the respondent contends, would not be entitled to the benefits of the Jones Act. This would put the steamship companies in such an advantageous position in relationship to their alien employees, that the Board of Directors of an American corporation would be duty bound to their principals to refuse employment to American seamen and to hire alien seamen, as such procedure would be to the financial advantage of such steamship companies or corporations which would not be chargeable with any liability for injury or illness caused a seaman by the negligent acts of officers or fellow members of the crew.

5. Finally, a reading of the Jones Act does not show that any distinction has been made as between alien seamen and American seamen. The only decisions that seem to make a distinction are those dealing with the internal affairs of vessels actually owned by alien citizens, where the contract of employment was not entered into in a United States port and where the additional feature is absent, namely, that the voyage commenced and/or terminated in a United States port.

6. It is manifestly unfair and unjust to deny to alien seamen employed aboard vessels chartered to the United States of America (fol. 593), the same rights accorded to American seamen, particularly where the operator of the vessel is actually under the control of the United States Navy.

CONCLUSION

This petition presents a question of extreme significance as to the rights of foreign seamen who sign articles in American ports for service with the American merchant marine. In addition thereto a serious national economic question is raised affecting the employment opportunities of American seamen on American owned vessels under foreign registry. The Court of Appeals of the State of New York has spoken with finality as to the application of the rights and remedies of the Jones Act and General Maritime Law, and by referring the petitioner to the non-existent remedies of Panamanian Law, has precluded him from realizing any recovery for a permanent and total disability suffered in aid of the United States war effort. Accordingly, it is respectfully urged that the petition be granted by this Honorable Court.

JACOB RASSNER,
Proctor for Petitioner.

ROBERT KLONSKY,
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The questions involved herein are extremely significant and should be determined by the highest tribunal of our land. The respondent, however, seeks to avoid the determination of the questions by citing cases not in point as to this Court's jurisdiction.

This Court has jurisdiction to grant the petition of Ib Chr Sonnesen as the record clearly shows that the Court of Appeals of the State of New York has fully adjudicated rights on facts not in dispute.

The complaint is framed pursuant to the Jones Act. The opinion of the Court of Appeals of the State of New York held that the jury was justified, on the evidence, in finding that the defendant's conduct toward the plaintiff was wrongful and tortious. The decision went further and held that the Jones Act could not be applied to this wrong, but that the petitioner must commence a new action by amending his complaint involuntarily so that it should be

grounded on Panamanian law. The only distinction between this remand and a new, independent action, is immunization from the statute of limitations.

The respondent relies on two cases (cited on p. 2 of respondent's brief), *Gospel Army* v. *Los Angeles, et al.*, 331 U. S. 543, 67 S. Ct. 1428; *Market Street Railway Company* v. *Railroad Commissioner of the State of California*, 324 U. S. 548, 65 S. Ct. 770, which are entirely beside the point and only refer to lack of finality when the parties are remanded to the same position as though the cases had never been tried. In the case at bar, petitioner is remanded in a worse position by reason of the fact that he is precluded by the Court of Appeals of the State of New York from proceeding under a Federal statute.

The case of *Gospel Army* v. *Los Angeles, et al., supra*, was an appeal from the Supreme Court of the State of California by reason of an injunction restraining and enjoining the defendant from interfering in the exercise of a religious liberty by means of restrictive ordinances. The facts were not stipulated or conclusive upon the lower courts as in the case at bar. The Supreme Court of California held that the lower court's action in granting the injunction was erroneous, and reversed the judgment. The Court recognized that in the State of California an unqualified reversal is effective to remand the case "for a new trial and places the parties in the same position as if the case had never been tried". As the facts were not stipulated nor were there any special procedural restrictions (see p. 1430 of opinion), this Court held that there was no finality for jurisdiction. The opinion went further however, and set forth the following as to the discretion of this Court in entertaining cases irrespective of the lack of finality expressed on the face of the judgment. Mr. Justice Rutledge stated on page 1430:

> "Increasingly this Court has become less formal in the matter of final judgments. It is no longer the rule that the face of the judgment is determinative of whether it is final. Today "the test is not whether under local rules of practice the judgment is denominated final * * * but rather whether the record shows that the order of the Appellate Court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court. * * * Department of Banking, State of Nebraska v. Pink, 317 U. S. at p. 268, 63 S. Ct. at page 235, 87 L. Ed. 254".

During the same term as the decision in the *Gospel Army* v. *Los Angeles, et al., supra,* this Court entertained jurisdiction despite the lack of finality expressed on the face of the judgment in *Richfield Oil Corporation* v. *State Board of Equalization,* 329 U. S. 69, 67 S. Ct. 156. That case was also an appeal from the Supreme Court of the State of California, and concerned a California tax and the claim that it was repugnant to Article 1, Sec. 10, Clause 2 of the Constitution of the United States of America. The case had been tried on the pleadings and stipulated facts, and the trial court found for the appellant. The Supreme Court of California ordered that the judgment "be and the same hereby is reversed" which in effect was a remand for a new trial. This Court held on p. 158:

> "The designation given the judgment by state practice is not controlling * * * ".

This Court thereupon went into the merits and reversed the Supreme Court of California. The dissent by Mr. Justice Black was not concerned with jurisdiction.

The second case cited by respondent in opposition to this Court's jurisdiction, *Market Street Railway Company*

v. *Railroad Commissioner of the State of California, supra,* is an example that "increasingly this Court has become less formal in the matter of final judgments".

In fact this Court allowed the appeal though it was prior to the finality thereof as expressed in the California Rules on Appeal. Mr. Justice Jackson writing for this Court held that a judgment is final when issues are adjudged as:

> "Our test is a practical one. When the case is decided, the time to seek our review begins to run" (p. 773).

It has been held by this Court that the possibility to obtain relief under a different statute or procedure does not affect the finality of the existing judgment. In the case of *Largent* v. *State of Texas,* 318 U. S. 418, 63 S. Ct. 667 (March 1943), on an appeal from the County Court of Lamar County, Texas, appellant had been convicted of a violation of an ordinance requiring an application for a written permit issued by the Mayor after a thorough investigation. After conviction, appellant appealed to the County Court where a trial *de novo* was had. After appellant's motions to quash the complaint on the ground that the ordinance violated the 14th amendment of the Constitution of the United States were overruled, the appellant was found guilty and fined $100. This Court recognized that under Texas practice the appellant could test the constitutionality of the ordinance under which she was convicted by a habeas corpus proceeding. The Court's opinion by Mr. Justice Reed stated on p. 669 as follows:

> "The possibility that the appellant might obtain release by a subsequent and distinct proceeding, and one not in the nature of a review of the pending charge, in the same or a different court of the State does not affect

the finality of the existing judgment or the fact that this judgment was obtained in the highest state court available to the appellant. Cf. *Bandini Petroleum Co.* v. *Superior Court,* 284 U. S. 8, 14, 52 S. Ct. 103, 105, 76 L. Ed. 136, 78 A. L. R. 826; *People of State of New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 70, 49 S. Ct. 61, 64, 73 L. Ed. 184, 62 A. L. R. 785".

CONCLUSION

Upon the determination by this Court that the provisions of the Jones Act are available to an alien seaman under the circumstances involved herein, which is the primary issue, equity and good practice indicate that this Court should liberally construe the law treating with jurisdiction of this Court, and entertain jurisdiction of this petition in the furtherance of substantial justice so as to obviate useless and wasteful litigation in the state courts below.

The determination that the petitioner cannot proceed in the lower courts under and by virtue of the Jones Act is final.

The facts can no longer be disputed by reason of the decision of the Court of Appeals of the State of New York.

The Court of Appeals of the State of New York has stated in unequivocal language that the rights as provided by Congress, as set forth in 46 U. S. C. A. 688, are not available to petitioner. This is a final adjudication by the highest tribunal of the State of New York, which bars a seaman's action under the Jones Act. The remittitur does no more than impose a ministerial function on the lower state court.

To compel the petitioner to start *de novo* under a foreign law which does not afford any or sufficient relief would defeat the interests of justice and preclude an adjudication by this learned tribunal on a most substantial question of law.

Wherefore, it is respectfully urged that this learned tribunal assume jurisdiction of this case and the most significant questions involved therein, which are of compelling importance to our bench, bar, the American maritime industry and merchant marine.

Respectfully submitted,

JACOB RASSNER,
Proctor for Petitioner.

ROBERT KLONSKY,
On Petition.

No. 708

Supreme Court of the United States

IB CHR. SONNESEN,
Petitioner,

against

PANAMA TRANSPORT COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE NEW YORK COURT OF APPEALS

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IB CHR SONNESEN,

Petitioner,

against

PANAMA TRANSPORT COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE NEW YORK COURT OF APPEALS.

STATEMENT.

Petitioner seeks a Writ of Certiorari to the Court of Appeals of the State of New York from a judgment of that court which did not finally dispose of the case but ordered a new trial of the issues between the parties. Petitioner had obtained a verdict in the trial court which was reversed and the complaint dismissed by the Appellate Division, Second Department of the New York Supreme Court (272 App. Div. 948; Transcript of Record, page 306, fol. 311). On appeal to the New York Court of Appeals a new trial was ordered (298 N. Y. 262; Transcript of Record, page 311, fol. 319).

POINT I.

THE UNITED STATES SUPREME COURT IS WITHOUT JURISDICTION TO GRANT A WRIT OF CERTIORARI TO A COURT OF ONE OF THE SEVERAL STATES WHERE THE JUDGMENT IS NOT FINAL.

The question of the lack of finality of the judgment below is simple. There are no complexities or court rules by which the judgment could be misconstrued as a final judgment. At the present time, the parties are in approximately the same position that they were in prior to the time that the trial below was had.

The statute upon which this petition is based (see page 2 of petitioner's brief) is Title 28 U. S. C. 1257, subdivision 3. That section reads in part as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • • • • •
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

This statute has been construed innumerable times and there has never been any doubt that a judgment directing a new trial is not final. A few of the cases are mentioned. *Gospel Army* v. *Los Angeles, et al.*, 331 U. S. 543; *Market Street Railway Company* v. *Railroad Commissioner of the State of California*, 324 U. S. 548.

In the *Gospel Army* case, the court said at page 546:

> "Under §237 of the Judicial Code U. S. C. Section 344 [now Section 1257] only 'final judgments' of state courts may be appealed to this Court. And it frequently has been said that for a judgment of an appellate court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court * * * directed.' *Department of Banking* v. *Pink*, 317 U. S. 264, 267. Thus, where the effect of the state court's direction is to grant a new trial, the judgment will not be final."

The quality of the finality of a judgment authorizing jurisdiction of the Supreme Court was defined in the *Market Street Railway* case, at page 551, as follows:

> "Our jurisdiction to review a state court judgment is confined by long-standing statute to one which is final. Judicial Code, §237, 28 U. S. C. §344. Final it must be in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

The petition does not assert that the judgment below was final. Apparently, the petition overlooks the need for finality of the judgment before the jurisdiction of this court may attach.

The remittitur in the case at bar (Transcript of Record p. 309, fol. 317) states:

> "Therefore, it is considered that the said judgments be reversed and a new trial granted with costs to the appellant to abide the event, as aforesaid."

The judgment in the case at bar fails in finality in the two respects declared necessary in the *Market Street* case (*supra*). The judgment is subject to further action by another state tribunal which is not a final court and there has not been an effective determination of the litigation.

In view of the defect in the jurisdiction, it is thought unnecessary to deal with statements as to the facts and law contained in the petition. The fact statements vary considerably from the record. Much of the argument made is based on these unsupported and untrue allegations as to the facts. The misstatements are so numerous that it would require many pages to answer them all and in the circumstances it is thought not only unnecessary to do so but that such rebuttal would put an unnecessary burden on the court.

A reading of the opinions of the Appellate Division and the Court of Appeals demonstrates that no such questions as are conjured by the petition exist in the record or even lurk in it.

CONCLUSION.

IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR A WRIT OF CERTIORARI BE DENIED FOR LACK OF JURISDICTION BECAUSE OF THE NON-FINAL CHARACTER OF THE JUDGMENT OF THE NEW YORK STATE COURT OF APPEALS.

Respectfully submitted,

WALTER X. CONNOR,
VERNON SIMS JONES,
Attorneys for Respondent.

Supreme Court of the United States

OCTOBER TERM 1949, No. 708

IB CHR SONNESEN,

Petitioner,

against

PANAMA TRANSPORT COMPANY,

Respondent.

BRIEF OF FRIENDS OF ANDREW FURUSETH LEGISLATIVE ASSOCIATION, *Amicus Curiae.*

FRIENDS OF
ANDREW FURUSETH
LEGISLATIVE ASSOCIATION.

SILAS B. AXTELL.

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Petitioner,

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Panama Transport Company,

Respondent.

BRIEF OF FRIENDS OF ANDREW FURUSETH LEGISLATIVE ASSOCIATION, *Amicus Curiae.*

Being a Proctor in Admiralty of the U. S. District Court for the Southern District of New York, Director of the Friends of Andrew Furuseth Legislative Association, and counsel for a number of seamen similarly placed as the petitioner herein, having the consent of petitioner's counsel to file this brief but having been denied permission by respondent, I respectfully petition this Court for permission to file the annexed brief *amicus curiae.*

The Friends of Andrew Furuseth Legislative Association was organized on March 12, 1939, the 85th Birthday, but one year after the death, of Andrew Furuseth, the creator of the La Follette Seamen's Act March 4, 1915 (Cong. Record, Debate and Proceedings, U. S. Senate, Oct. 2, 7, 9, 16, 18, 20, 21, 22, 23, 28 1913). Hon. William Denman, U. S. C. A. 9th Dist., San Francisco, Calif., who was counsel to Woodrow Wilson at the signing of the Seamen's Act on March 4, 1915 (See symposium on Life and Work of Andrew Furuseth, Darwin Press, New Bedford, Mass.,

pages 16, 224) is an honorary Trustee of this association, the stated purpose of which is to protect seamen and assist in the passage and enforcement of the legislative policies of Andrew Furuseth, sometimes known as the Abraham Lincoln of the Sea.

The respondent has opposed this petition for certiorari on the ground that the judgment of the Court of Appeals is not final. I have read the petitioner's brief, the respondent's brief in opposition and the reply brief which, I am informed, the petitioner will file, and I am satisfied that this Court has a broad and sound discretion to review the application of this statute of the United States, which is final, as to the determination of the petitioner's rights. Having been identified with Andrew Furuseth as adviser on the La Follette Seamen's Act, its preparation and amendments, before Congress from 1908 until it was signed on March 4, 1915; having been counsel in a case which this Court declared ineffectual, in our effort to do away with the Fellow Servants Rule as to Section 20 of said Act (*Chelentis* v. *Luckenbach,* 247 U. S. 372); having been counsel with Justice Sutherland, then an ex-Senator from the State of Utah, in the drafting of the Jones Act; and having been counsel for and having briefed the case in which this Court construed the Jones Act, harmonizing it as part of the general maritime law of the United States (*Johnson* v. *Panama,* 264 U. S. 375); I feel that it is my duty, so far as I can, to describe the conditions as they existed before 1915 on the high seas, and the purposes which the framers of the La Follette Seamen's Act and its amendments had in mind.

POINT I

The public interest requires a decision by this court on the question of the applicability of the United States Maritime Law as to foreign vessels engaged in competition with vessels of the United States.

The Jones Act of June 5, 1920, Section 688, U. S. C. A. amendment of the Act of March 4, 1915, made the Railway Servants' Act, Section 8657—Act of April 22, 1907, Chapter 149, Section 51, applicable to seamen by reference. The act,

> "688. Recovery for injury to or death of seamen. Any seaman who shall suffer personal injury in the course of his employment, may at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply, and in cases of death of any seaman as a result of any such personal injury, the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides, or in which his principal office is located."

Section 20 of the La Follette Seamen's Act of which it was an amendment, was a negative attack on the Fellow Servant Rule which had been applied by this Court as an effective defense—*Quebec* v. *Merchant,* 133 U. S. 375; *Osceola,* 189 U. S. 158. However, this court in *Chelentis*

v. *Luckenbach* decided that the Fellow Servant Rule never had been part of the Maritime Law; that that law was based on a *warranty of seaworthiness of the vessel* and the obligation of the owner to furnish maintenance and cure, the origin of which was the ancient maritime code of the Phoenicians (*Reed* v. *Canfield,* 20 Fed. Case 426—No. 11641).

From his statement in the United States Senate, Cong. Record 73rd Congress, First Session (*supra*), page 66, 15859-12506, but beginning on page 65, I conclude that Mr. Justice Sutherland was under the impression that Section 20 would be effective. At any rate, this Court eventually made the Jones Act effective as to the owner's liability for negligent acts of co-servants and established the seaman's right to an election to have a jury trial. (*Johnson* v. *Panama, supra.*)

Justice Cardozo, in *Cortez* v. *Bull,* 287 U. S. 370, harmonizes the cause of action growing out of the obligation to furnish care with the right to a trial by jury under the Jones Act. The cause of action upon which the jury based its verdict for Sonnesen arose out of his employment on this vessel (Petitioner's brief; p. 6), *i. e.,* neglect to treat (p. 7). The judgment was for both Maintenance and Cure, Six Thousand ($6,000) Dollars, and for damages resulting from neglect to treat (p. 4, Petitioner's brief) Fifteeen Thousand ($15,000) Dollars.

From the record herein (p. 3, Petitioner's brief) it appears that the respondent herein, with an office and place of business within the jurisdiction of the United States, was operating as a subsidiary of the Standard Oil Company of New Jersey, at the time the cause of action herein arose. The Standard Oil Company of New Jersey similarly operated the "Wabasha" (*Low Ling Sing* v. *Standard Transportation Co.*), 274 Fed. 1017, 1921. Judge Learned Hand, who dissented in the *Kyriakos* case, 151 Fed. 2d 132, had no difficulty in 1921 in construing the Seamen's Act

and its purposes to equalize the operating costs of foreign and American competing vessels, page 1018:

> "The bill was under discussion before Congress and the country three years before the majority and minority (certainly the minority) of the Committee on Merchant Marine in their reports of May 1912, report 645, 62d Cong. 2nd Session, appeared to assume that the Section in this respect was unchanged."

The Seamen's Act is based on three main features. First, abolition of serfdom,—arrest for desertion; second, safety of crew and passengers; third, equalization of operating costs to discourage owners from putting their money in foreign bottoms to the disadvantage of American Merchant Marine. While the Act was pending (1913), Senator La Follette, page 48 Cong. Record (*supra*), 15859-12506, said:

> "I will read just a portion of a paragraph; it is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement."

The Seamen's Act did direct the President to abrogate all commercial treaties between the United States and foreign nations. The general purpose of the Seamen's Act and the means by which it was accomplished are explained in Merchant Seamen's Law, Darwin Press, New Bedford, Mass., pages 29-44, and the Jones Act pages 45 to 72.

The equalization feature of the Seamen's Act is expressed in U. S. Code Annot. 597 R. S. 4530, Dec. 21, 1898, as amended March 4, 1915, Chapter 153, Section 4, 38 stat. 1165:

> "Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of

the vessel to which he belongs, one-half part of the balance of his wages earned and unpaid at the time when such demand is made at every port where such vessel after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void: Provided such a demand shall not be made before the expiration of, nor oftener than once in five days, nor more than once in the same harbor on the same entry. Any failure on the part of the master to comply with this demand shall release the seaman from his contract, and he shall be entitled to full payment of wages earned. And when the voyage is ended, every such seamen shall be entitled to the remainder of the wages which shall be due him as provided in the preceding section: Provided further, That notwithstanding any release signed by any seamen under Section 644, any court having jurisdiction, may upon good cause shown, set aside such release and take such action as justice requires; And provided further, that this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement."

There was careful consideration by Congress and serious opposition to the passage of the Seamen's Act; for instance, Senator Lane (Congressional Record, Sixty-Third Congress, First Session, p. 61) said (15859-12506)

"* * * I do have an idea, however, that if we do not guard this measure well, we will become involved in international disputes. I think that it is a matter of great importance that we should do nothing which we are not justly entitled to do in our general business and friendly relations with other nations * * *."

Mr. Senator Burton of Ohio, on page 56 of the Congressional Record, quoted from a decision of Chief Justice Waite of this Court, Congressional Record, Sixty-third Congress, First Session, p. 56, and it would appear that the provision to abrogate treaties as part of passing the Act, was due to Senator Burton' argument.

The Court of Appeals of New York, however, has ignored in its decision all that has happened since 1915. They have treated this case as though the equalization policy of the LaFollette Seaman's Act had not been preceded by the abrogation of treaties that had previously given Consuls exclusive jurisdiction over matters involving the rights of mariners which related to the *internal regime* of the vessel, such as *wages,* maintenance *and cure, damages* for *neglect to treat,* and *personal injuries* on board vessel that occurred while within the territorial jurisdiction of the United States.

In *Uravich* v. *Jarka,* 282 U. S. 234, this Court did not hesitate to enforce the Jones Act as to longshoremen. Mr. Justice Holmes, speaking for this Court, held that *they* were "seamen", the loading and discharging of the vessel being part of the work of the mariner. (*Haverty,* 272 U. S. 50.)

Judge Learned Hand, who failed to concur in *Kyriakos* (*supra*), decided from the bench in 1924, a case in which the facts were on all fours with the facts in this case. He denied the motion of the shipowners' lawyer, Mr. Jones of counsel for the *respondent* here, to dismiss an action at law under the Jones Act.

The case was *Stewart* v. *Pacific Navigation Company,* 1924 AMC. 1272—3 Fed. (2) 329. Judge Hand said that only one point is *raised on this motion*—to set aside *the service of* the summons, and that under Section 20 of the Act of March 4, 1915, commonly called the Jones Act, "no

action can be brought against a foreign corporation", but he disposes of this point adversely to the respondent. Although cited to the Circuit Court of Appeals since then, as in other cases, *The Paula,* 91 F. (2) 1001, and *O'Neil* AMC. 1947, 505, this Stewart decision has been ignored. Because we believe Judge Hand then correctly stated the law and no court since then has effectively done so, I quote the decision in full:

> "Only one point is raised on this motion to set aside the service of the summons, and that is, that under 20 of the Act of March 4, 1915, commonly called the Jones Act, no action can be brought against a foreign corporation. This position is taken not because of an intimation in the general language which creates the right of action, for which the section concludes, which reads as follows 'Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides, or in which his principal office is located.' The Supreme Court in the case of The Allianca, Panama R. R. v. Johnson, 1924 A. M. C. 551, said very aptly that this sentence was not happily worded and the infelicity of the language causes the question in this case, as well as in that. In the case I have just cited, the sentence is construed as obviously it must be construed, not as a question of the affirmative bestowal of jurisdiction, but merely as a question of venue, and I must therefore, construe it in the same sense here. The general bestowal of jurisdiction is to be found in the right sentence, the long one; it lays down what the right shall be and against whom it shall exist. As I have already said, this language is general; *there is no indication of any purpose to limit it to U. S. Corporations,* and it would be highly unreasonable to impute any such purpose to Congress, for the result would be not only to deprive American seamen of the protection which the Act was meant to give

them when serving on foreign ships, but to *give advantage to such ships as against American ships.* We all know that the purpose of Congress is directly the opposite. That being very clear, the main purpose of the Act, how am I to interpret the last sentence, which confers jurisdiction. It seems to me that this would be very easy in the case of a foreign corporation. The phrase 'in which its principal office is located' clearly means in which the principal office of the foreign steamship company is located within the United States. There alone the action can be brought and if the section intends to cover foreign corporations, for the reasons I have given, there alone the action will lie. To my mind it is no strain on that language to interpret it in the way which I suggest. The Principal office of a foreign corporation will normally mean the principal office where it does its business in the United States. It may be, and it might be in this case, that the defendant did too little to justify assumption of jurisdiction at all. A certain amount of business must be carried on within the United States in order to get any person jurisdiction, and that is the imputation which this statute carries along with the others. But no such point is raised in the case at bar. It is conceded that so far as the defendant goes, it subjects itself personally to jurisdiction if that is what the section means; that being the case, I am satisfied that in this case it means what I have said.

Therefore the motion will be denied." (Italics ours.)

At the time of the 1924 Jones Act decision *Stewart* v. *Pacific supra,* which I maintain is correct, Judge Learned Hand had reviewed only three years earlier the equalization wage cases of the Seamen's Act. Lo Ling Sing 274 Fed. 1017-1018. Though Judge Hand cited the Circuit Court of Appeals (Fifth Circuit) decision in the Strathearn case (239 Fed. 583) this court (Mr. George Suther-

land being of counsel for the seamen), had sustained that decision on March 29, 1920, *Dillon* v. *Strathearn*, 252 U. S. 348.

Justice Day, for a unanimous court in that case said at page 354:

> "The language applies to *all seamen* on vessels of the United States and the second proviso of the section as it now reads makes it applicable to seamen on foreign vessels while in harbors of the United States * * *
>
> "It is said that it is the purpose to limit the benefit of the act to American seamen, notwithstanding this provision giving access to seamen on foreign vessels to the courts of the United States, because of the title of the act in which its purpose is expressed 'to promote the welfare of American seamen in the merchant marine of the United States.' But the title is more than this, and not only declares the purposes to promote the welfare of American seamen but further to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea." (Italics ours.)

When the Seamen's Act was passed wages on American vessels were about $40 a month for able seamen, British and other foreign vessels, mostly tramps, $20 or four pounds ten shillings. By 1917 two years after the passage of the Seamen's Act and one year after its enforcement (treaty abrogation) British and foreign real wages by reason of the Half Wage Law and abolition of arrest for desertion (and collective bargaining in England at least) had risen to a parity with American wages, American able seamen $85, British able seamen 15 pounds ten shillings.

During the recent war American able seamen's wages have risen to $225 a month. The British and foreign sea-

men are about $125 a month. For about fifty years there has been in existence an international labor organization known as the International Transportworkers' Federation, main office Maritime House, Oldtown Clapham, London, S. W. 4, England, New York office 5 Beekman Street, New York 7, N. Y. (This organization is opposed to International federation dominated by the Russian Soviet so-called labor unions.) From its May 13th report, Vol. 9 No. 8 Page 1, I quote:

> *"U. S. Ships Carry 43% of E. C. A. Cargoes*
>
> (ITF) The National Federation of American Shipping, Inc. declared on March 23rd that only 43% of the Aggregate ECA cargoes was carried by United States flag ships in January and February as shown by the reports of the Economic Cooperation Administration. Of these 43%, about 10% was shipped in Army owned vessels and only 33% in Commercial vessels.
>
> The Federation declared that despite the requirements that 50% of the over-all cargo should have abroad in American ships only a small percentage of ECA cargoes has been shipped on United States vessels. From April 1948 to February 1949 the United Kingdom shipped 17.6% of ECA cargoes from the U. S. on U. S. Flag vessels, the Netherlands 29.8%, Denmark 17.7% and Norway 30.7%."

Our press of course has contained many reports lately showing the moving of freight from high wage and insurance American vessels to low wage and insurance foreign vessels. In the Master, Mate & Pilot (Publ. AFL) May 1949, page 11 is an article entitled "World Boycott of Panamanian Vessels Planned at AFL Meeting in New York." From this article I quote:

> "It was the unanimous consensus that this boycott action must be taken, because already there are ap-

> proximately three million tons of shipping flying the Panamanian flag for the purpose of evasion of taxation, safety regulations, and social and labor standards. Legitimate Panamanian flag ships owned and operated by Panamanian citizens for the interest of Panamanian commerce will not be affected by this boycott."

According to this article delegates from American seamen's unions and longshore unions are at this very moment in attendance at a conference on this Boycott Plan in London.

In the passing of the Seamen's Act one of the most effective arguments to members of Congress was, as often quoted in the language of Andrew Furuseth and restated by late Justice Sutherland when a U. S. Senator (Page 66 of Congressional Record 15859-12506):

> "The Caucasian is leaving the sea; the Oriental is filling the vacancy. Seapower is in the seamen; vessels are the seamen's working tools; tools become the property of those who handle them. This is not a prophesy it is a fact. If the reader needs proof let him visit the docks where the ocean cargo carrier, the tramp is taking in or delivering a cargo etc."

This was read by Senator Sutherland in the United States Senate in October 1931 page 66 *supra*. After the writ herein is granted, it may be that we will have to have more Federal Judges to hear and dispose of the many cases that will be brought up in order to enforce the Maritime Safety Laws of the U. S. against foreign vessels as a condition of entry, but that is a difficulty that can be remedied and it will give employment to many lawyers who are well qualified to bring democratic government to the seamen and the people.

Compensation acts do not create safe conditions. As Andrew Furuseth explained in a document filed in support

of Senate Bill 1080 reprinted in Symposium on Andrew Furuseth at Darwin Press, New Bedford, Mass., Page 161—also Merchant Seamen's Law, Page 76. Here Mr. Furuseth shows how The Jones Act makes negligent ship operation unprofitable and the careful operator who provides his vessel with modern machinery and an adequate number of skilled seamen and maintains it in that condition saves money. My own thought is that the public as evidenced by recent reports of the National Safety Council could not lose by elective "Jones Acts" in every state of the U. S. Compensation acts do not discourage accidents and they do not even maintain the widows and cripples who become in part at least public charges. Captain Albert E. Oliver one of the directors of the Friends of Andrew Furuseth Legislative Association in a speech made March 12, 1949 on the occasion of the 95th birthday of Andrew Furuseth said—"We are now confronted with a menace to our merchant marine * * *". If our courts had enforced the Seamen's Act particularly as to the amendment of Section 20, I wonder whether it would have been profitable for ship-owners to transfer hundreds of merchant vessels to the flag of Panamania.

Not only is the public interested in the cost of maintaining the subsidy payments to American shipowners to make up the difference between the operating cost of foreign and American vessels, but our hospitals are filled with seamen suffering from tuberculosis and other diseases and injuries which they acquired while employed on Panamanian and Honduras vessels. The case of Ramon Espanoza on the "Ivy G", a Panamanian vessel formerly a liberty ship owned by Orian Steamship Co., was burned while acting as second cook on the 1st of January, 1948. After being treated in a hospital in Antwerp for a few weeks he was returned to the United States. He entered the U. S. Marine Hospital where it was discovered that he had tuberculosis and had been a patient for months.

While that suit was pending (and it still is pending) it was discovered that he had acquired the tuberculosis on another vessel, the "Aris", another Panamanian vessel, and the physician who examined him for the company at the end of the voyage to avoid expenses did not report the condition. Consequently he made the trip on the "Ivy G" and when he was in the hospital the doctors discovered that he had a cavity in one of his lungs. I dare say that there are dozens of such cases of seamen receiving treatment in public hospitals in this city, right now. Espanoza is now receiving treatment at Bellevue and Seaview Hospital and if the decision of the Court of Appeals in the case at bar is to stand not only will our merchant shipping all move to cheaper bottoms and we will have none of our own except what we pay for entirely at government expense but we will continue to have to pay as tax payers the cost of care and cure of hundreds of seamen who are disabled on vessels owned by companies, who as Captain Oliver says evade payment of tonnage taxes, income taxes, disregard our safety laws and abandon their neglected mariners.

Having placed these true facts before this court I hopefully expect the granting of a writ of certiorari.

Respectfully submitted,

FRIENDS OF
ANDREW FURUSETH
LEGISLATIVE ASSOCIATION.

SILAS B. AXTELL.

FILE COPY

Supreme Court of the United States

October Term, 1948—No. 708.

IB CHR SONNESEN,

Petitioner,

—against—

PANAMA TRANSPORT COMPANY,

Respondent.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

JACOB RASSNER
Proctor of Petitioner

ROBERT KLONSKY
On Petition

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On May 30, 1949, this Court entered the following order in the case of *Sonnesen* v. *Panama Transport Co.*, No. 708, October Term, 1948:

> "The motion for leave to file brief of Friends of Andrew Furuseth Legislative Association as amicus curiae is granted. The petition for writ of certiorari is denied".

The petition was based on a decision of the Court of Appeals of the State of New York, reported at 298 N. Y. 262, 82 N. E. 2d 569, which denied petitioner the rights and remedies of Section 20 of the Act of March 4, 1915, commonly called the Jones Act, and remanded him to a new cause of action under Panamanian Law. This remand followed a determination by the highest state court of the State of New York that the defendant's conduct toward the plaintiff was wrongful and tortious, and on a record that showed this defendant had a place of business in the State

of New York, that the illness was caused and aggravated during a voyage on the defendant's vessel while proceeding from and to United States ports, under the control and domination of United States authorities, and on the uncontradicted evidence that the defendant was in fact owned by a United States corporation.

There is no question but that the facts are now conclusive as to the liability of the respondent herein, and that the petitioner had been precluded from proceeding in a state court under and by virtue of the Jones Act.

It is apparent that the issue involved herein is substantial and that the denial of the petition for a writ of certiorari inflicts great damage on our maritime industry and merchant marine by reason of the encouragement given to shipowners, foreign as well as American, to register their vessels under foreign flags so as to avoid the effect of American statutory law and to hire alien seamen who are precluded from the rights and remedies of the Jones Act. A definitive decision by this Honorable Court under the circumstances herein is compelling.

POINT I

The case of *Stewart* v. *Pacific Navigation Company* is directly in point and the error in reporting this civil action as in admiralty would seem to warrant this petition for re-hearing.

This petition for re-hearing is prompted in part by a communication received from Silas B. Axtell, Esq., dated June 2, 1949, wherein he states that the case of *Stewart* v. *Pacific Navigation Company*, 3 Fed. (2d) 329, opinion by Hon. Learned Hand of the Court of Appeals for the Second Circuit, set forth in full on pp. 8 and 9 in the brief *amicus curiae*, had been incorrectly reported as *"In Admiralty,"* where actually it was a civil action bearing docket number 32-388/1924 in the United States District Court for the Southern District of New York. The fact that this is an error has been confirmed by proctor for petitioner. Attached herewith is a photostatic copy of a letter from the Office of the Clerk, United States District Court for the Southern District of New York dated June 9, 1949 also confirming this error.

As the case of *Stewart* v. *Pacific Navigation Company, supra*, is directly in point on the proposition that an alien seaman can institute action against a foreign corporation under the Jones Act, its principal office for the purposes of the Act to be deemed where it does its business in the United States, it follows that the error of the reporter in citing the *Stewart* case as *"In Admiralty"* is most pertinent herein, for the following reasons:

1. The determination by the Court of Appeals of the State of New York that the petitioner may not avail himself of the rights and remedies inherent in the Jones Act, is a

decision on a federal question of substance in conflict with a decision of the Court of Appeals for the Second Circuit.

2. The basic purpose of the Jones Act was to give seamen injured in the course of their employment the right to maintain an action at law for the recovery of damages, with the right of trial by jury. *Anelich* v. *The Arizona,* 56 S. Ct. 707, 298 U. S. 110. This basic right was affirmed by the Court of Appeals for the Second Circuit in the *Stewart* case, *supra,* and denied by the Court of Appeals of the State of New York in the instant case.

3. The reasoning of Hon. Learned Hand in the *Stewart* case, *supra,* which case concerned an alien seaman suing an alien shipowner, supports petitioner's contention that the denial of the petition for a writ of certiorari redounds to the disadvantage of United States shipping, where he states as follows:

> "As I have already said, this language is general; *there is no indication of any purpose to limit it to U. S. Corporations,* and it would be highly unreasonable to impute any such purpose to Congress, for the result would be not only to deprive American seamen of the protection which the Act was meant to give them when serving on foreign ships, but to *give advantage to such ships as against American ships.* We all know that the purpose of Congress is directly the opposite." (Italics added.)

POINT II

The remittitur imposes an unfair burden on petitioner by compelling an involuntary proceeding against respondent under Panamanian law, which allows but nominal damages and in effect excuses respondent for its wrongful and tortious conduct.

The *remittitur* is a final determination by the highest state court of the State of New York that the petitioner is denied the benefits of the Jones Act. This in effect is a termination of all of petitioner's claims predicated on the shipowner's negligence, as the Law of Panama does not provide for recovery of damages caused by the wrongful and tortious conduct of the shipowner or of a fellow seaman.

Book I of the Labor Code of Panama as published in the Official Gazette, No. 10.459, November 26, 1947, effective March 1, 1948, sets forth the following "indemnities" under Article 218:

> "3.—In the case of permanent total disability, the worker shall be entitled, once the disability has been established, to receive an income during three (3) years, fixed on the basis of sixty percent (60%) of his annual salary; during the next two (2) years an income equal to forty percent (40%) of his annual salary; and for two years more to thirty percent (30%)".

As Panamanian Law makes no provision for recovery for wrongful and tortious conduct by a shipowner or fellow seaman, the *lex loci delicti* accordingly shall govern, as the tortious acts were primarily and substantially committed

in territories, ports and waters under United States jurisdiction.

See:

Huntington v. *Attrill*, 146 U. S. 657;
Stewart v. *B. & O.*, 168 U. S. 445.

We should not put a premium on the transfer of American ships to foreign registry, and on the employment of alien seamen to the exclusion of American seamen. This would follow where American shipowners could escape the provisions of the Jones Act and thereby achieve immunity from the "Preventive Theory" of justice to the end that shipowners under Panamanian Law would have little incentive to provide for the safety and well-being of their seamen.

American shipowners should not be permitted to avoid the obligations imposed by Congress by mere paper transfers of ships' titles.

It is respectfully urged that this Honorable Court grant the petition herein to the end that a definitive decision be rendered on a most substantial question of law, the denial of which must inflict great damage on the future of the American maritime industry and merchant marine.

Respectfully submitted,

JACOB RASSNER
Proctor of Petitioner

ROBERT KLONSKY
On Petition

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK
OFFICE OF THE CLERK
U. S. COURTHOUSE
FOLEY SQUARE, NEW YORK 7, N. Y.

WILLIAM V. CONNELL
CLERK

COPY RECEIVED
JUN 10 1949
SILAS B. AXTELL

June 9, 1949.

Silas B. Axtell, Esq.,
15 Moore Street,
New York 4, N.Y.

Re: Lindville Taylor vs.S.Livanos & Co.Inc.
S. S. "Atlantic Air".

Dear Mr. Axtell:

Reference is made to your letter of June 7, 1949.

I have examined the report in 1924 A.M.C. 1272 of the case of Stewart vs. Pacific Steam Navigation Co., and have noted that the parties are named as libelant and respondent. In checking the records of this Court we find an action bearing the title of Leonard Stewart vs. Pacific Steam Navigation Company was filed and docketed on the common law side of the Court on January 30, 1924 and bears docket number Law 32/388. We also find that the motion to set aside the service of the summons, etc., and referred to in 1924 A.M.C. 1272 is recorded in the Law Docket 32-388. The motion papers are entitled Leonard Stewart, plaintiff vs. Pacific Steam Navigation Co.,defendant. Judge Learned Hand in his decision dated May 2, 1924 denying the motion, refers to the Pacific Steam Navigation Co., as defendant. No where in the record do we find that the case was ever transferred from the common law side to the admiralty side of the Court.

There is enclosed a photostat copy of Judge Learned Hand's decision of May 2, 1924, in which it will be noted at the heading thereof and under the title of the action the letter A precedes the numerals 32/388. It may be the report of the parties as libelant and respondent was occasioned by the typing in of the letter A instead of L (for law) in the opinion.

I trust I have made myself clear.

Very truly yours,

William V. Connell

WILLIAM V. CONNELL,
Clerk.

WVC:b
Encl.

Certificate

To the Honorable Chief Justice and Honorable Associate Justices of the Supreme Court of the United States:

Honorable Sirs:

The undersigned proctor for petitioner hereby certifies on honor that the Petition for Rehearing on Petition for Writ of Certiorari to the Court of Appeals of the State of New York in the matter of *Ib Chr Sonnesen against Panama Transport Company,* October Term, 1948, No. 708, is presented in good faith and not for the purpose of delay.

Proctor for petitioner further certifies that the within Petition for Rehearing was mailed from his office to the Office of the Clerk, Supreme Court of the United States, Washington 13, D. C. on the 15th day of June 1949 and resulted from the denial by this Honorable Court of a Writ of Certiorari to the Court of Appeals of the State of New York dated the 31st day of May 1949.

Proctor for petitioner further certifies that the within Petition for Rehearing was effected and mailed in accordance with Rule XXXIII of the General Rules of this Honorable Court without knowledge of the amendment thereof effective October 1947, which amendment requires the filing of the Petition for Rehearing within fifteen (15) days after judgment or decision when accompanied by proof of service on the adverse party, instead of the twenty-five (25) day period previously in effect.

Proctor for petitioner respectfully prays this Honorable Court or a Justice thereof to enlarge the period of filing the within Petition for Rehearing by two (2) days, in accordance with Rule XXXIII as amended, so as to make said petition timely, and for such other and further relief as this Honorable Court deems just and proper.

Respectfully submitted,

JACOB RASSNER
Proctor for Petitioner

Dated, New York, N. Y., June 20, 1949.

No. 708

Supreme Court of the United States

IB CHR SONNESEN,

Petitioner,

against

PANAMA TRANSPORT COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS.

STATEMENT.

Petitioner again disregarding the non-final character of the judgment of the New York Court of Appeals applies for a rehearing on the pretended ground that the decision of the New York Court of Appeals is in conflict with a decision of the United States Circuit Court of Appeals for the Second Circuit in *Stewart* v. *Pacific Steam Navigation Company* 3 F. 2d 392. The fact is that the *Stewart* case was not a decision of the Circuit Court of Appeals and it is in no way in conflict with the law established by the Court of Appeals for the Second Circuit, (*vide O'Neill* v. *The Cunard White Star Line Ltd.*, 160 F. 2d 446). Indeed, the decision of the New York Court of Appeals in the case at bar is based on the opinion of Chief Judge Learned Hand in the *O'Neill* case.

POINT I.

THE UNITED STATES SUPREME COURT IS WITHOUT JURISDICTION TO GRANT A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS BECAUSE THE DECISION OF THAT COURT WAS NOT A FINAL ONE. THE CASE OF *Stewart* v. *Pacific Steam Navigation Co.*, A DISTRICT COURT CASE, RELIED ON BY PETITIONER, IS IRRELEVANT.

Petitioner again fails to attempt to distinguish the cases cited in respondent's brief in opposition to his petition for a Writ. *Gospel Army* v. *Los Angeles, et al.* 331 U. S. 543; *Market Street Railway Company* v. *Railroad Commissioner of the State of California* 324, U. S. 548. There is no distinction. The doctrine in the *Gospel Army* and *Market Street* cases was recently affirmed in *Urie* v. *Thompson* No. 129, October Term 1948 decided May 31, 1949. The court said at page 7:

> "From the opinions of the state supreme court we know judicially that its judgment negating the general claim for negligence was coupled with its subsequently repudiated conclusion that petitioner had stated a cause of action under the Boiler Inspection Act and that, consequently, the court remanded the cause for trial, not for dismissal. The judgment therefore was not final; it was interlocutory and not reviewable here within the meaning of our jurisdictional statute. 28 U. S. C. §344 (b) (now §1257 (3))."

Nor does the incorrect reference to *Stewart* v. *Pacific Steam Navigation Company*, 3 F. 2d 329 change the status of the petitioner's rights. That case concerned only the venue provisions of the Jones Act (46 U. S. C. A. 688) with relation to a foreign corporation. Moreover, it appears

from the opinion that the *Stewart* case did not concern an alien seaman but an American seaman. In the part of the opinion quoted on page 4 of petitioner's brief, the court directly refers to "American" seamen.

In any event, that case is not determinative of the rights of alien seamen to recover under the Jones Act for an event which took place on the high seas on a vessel flying a foreign flag. The Court of Appeals for the Second Circuit determined that such a seaman could not recover under the Jones Act. *O'Neill* v. *The Cunard White Star Line Ltd.*, 160 F. 2d 446. The petitioner persistently ignores the *O'Neill* case for it is contrary to his contention here. He prefers to misstate the law and the facts of the totally irrelevant *Stewart* case.

CONCLUSION.

THERE IS NO JURISDICTION TO GRANT A WRIT OF CERTIORARI TO THE NON FINAL DECISION OF THE COURT OF APPEALS OF NEW YORK AND THE PETITION FOR A REHEARING SHOULD BE DENIED.

Respectfully submitted,

VERNON SIMS JONES,
WALTER X. CONNOR,
Attorneys for the Respondent.

CERTIORARI

DENIED